

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ROCKWELL MINING, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No: <u>18-1329</u>
NATIONAL LABOR RELATIONS	)	
BOARD,	)	NLRB Case Nos. 09-CA-216001; 09-RC-
	)	202389
Respondent.	)	
	)	
	)	
	)	

**UNDERLYING DECISION FROM WHICH THE PETITION ARISES**

Petitioner Rockwell Mining, LLC, by undersigned counsel and pursuant to the Court's December 17, 2018 order, hereby submit the underlying decision from which the petition arises, the final Decision and Order of the National Labor Relations Board, entered on December 11, 2018, in NLRB Case 09-CA-216001, entitled *Rockwell Mining, LLC and United Mineworkers of America, AFL-CIO, Region 2, District 12*, reported as case 367 NLRB No. 46, a true and correct copy is attached hereto as **Exhibit A**.

Dated: January 15, 2019

/s/ Anna M. Dailey  
/s/ Forrest H. Roles  
/s/ Jacqueline N. Rau  
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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Rockwell Mining LLC and United Mineworkers of America, AFL-CIO, Region 2, District 12. Case 09-CA-216001**

December 11, 2018

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 5, 2018, by United Mineworkers of America, AFL-CIO, Region 2, District 12 (the Union), the General Counsel issued the complaint on June 29, 2018, alleging that Rockwell Mining LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it and to furnish relevant information following the Union's certification in Case 09-RC-202389. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On August 15, 2018, the General Counsel filed a Motion for Partial Summary Judgment and a memorandum in support. On August 22, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Partial Summary Judgment**

The Respondent admits its refusal of the Union's requests to bargain and to provide information, but contests the validity of the Union's certification based on its objections to the election in the underlying representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.<sup>1</sup> The Respondent does not offer to ad-

duce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to many of the items in the Union's request for information. The complaint alleges, and the Respondent admits, that on February 28, 2018, the Union requested the following information:

1. A roster of all bargaining unit employees on the payroll from January 1, 2016, to present, including their:

- i. addresses
- ii. email addresses
- iii. phone numbers
- iv. job title
- v. mine and/or facility designation
- vi. daily rate of pay and
- vii. date of hire and/or discharge

2. Copies of all health, life and other insurance policies in effect for all bargaining unit employees.

3. Copies of any and all individual contracts of employment for any and all bargaining unit employees.

4. Copies of any pension plan, savings plan and/or 401(k) plans in effect for all bargaining unit employees.

5. For calendar year 2016-2017 and to date, provide a quarterly distribution of coal production, hours and employment by type of operation:

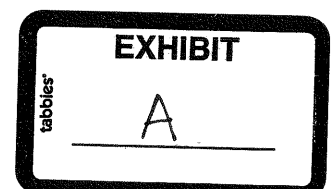
- A. Surface mines
- B. Common facilities

6. Distribution of hours should be provided on the following basis:

- A. Straight time hours
- B. Daily overtime hours
- C. Saturday hours
- D. Sunday hours
- F. Day shift hours
- G. Evening shift hours
- H. Midnight shift hours

<sup>1</sup> Chairman Ring did not participate in the underlying representation proceeding. He agrees with his colleagues that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and

that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.



7. For calendar year 2016–2017 and to date, provide the distribution of bargaining unit employees by grade and job classification.

- A. Employees at surface mines
- B. Employees at common facilities

8. Provide the job description, including the duties and minimum qualifications, for each job classification listed above.

9. For calendar year 2016–2017 and to date, provide a distribution of employees by age:

- A. Surface mines
- B. Common facilities

10. For calendar years 2016–2017 and to date, provide a distribution of employees by years of continuous service with the current employer.

- A. Surface mines
- B. Common facilities

11. For calendar year 2016–2017 and to date, provide a distribution of annual earnings by employees:

- A. Surface mines
- B. Common facilities

12. For calendar year 2016–2017 and to date, provide a distribution of employees by sex:

- A. Surface mines
- B. Common facilities

13. Provide a distribution of employees on lay-off by years of continuous service with Rockwell-Blackhawk for the year 2016–2017 and to date:

- A. Surface mines
- B. Common facilities

14. For calendar year 2016–2017 and to date, provide the following work force turnover information:

- A. Numbers of retiring employees
- B. Numbers of voluntary quits
- C. Number of involuntary terminations
- D. Number of recalls from any panel Rockwell/Blackhawk operations
- E. Number of new hires
  - i. with experience
  - ii. without experience

15. For calendar year 2016–2017 and to date, provide the total cost of unemployment compensation insurance.

16. For calendar year 2016–2017 and to date, provide the total cost of workers' compensation insurance.

17. For calendar year 2016–2017 and to date, provide the total cost of black lung insurance.

18. For calendar year 2016–2017 and to date, provide the total amount of wages paid for newly hired and experienced miner orientation.

19. For calendar year 2016–2017 and to date, provide the total amount of wages paid for newly hired and inexperienced miner orientation.

20. For calendar year 2016–2017 and to date, provide the total amount of wages paid for annual re-training.

21. For calendar year 2016–2017 and to date, provide the number of covered employees, the number of total covered participants and the average monthly cost of the following benefits:

- A. Hospital benefits
- B. Physician services
- C. Prescription drugs
- D. Vision care services
- E. Dental care
- F. Life and accidental death and dismemberment insurance

22. For calendar year 2016–2017 and to date, provide the following data regarding sickness and accident benefits:

- A. Number of employees receiving S & A benefits
- B. Number of employees who exhausted all S & A benefits
- C. Average length of S & A benefits
- D. Total cost
- E. Average cost per hour worked

23. Provide the monthly cost of employer-provided health, life and AD & D benefits since January 1, 2017 for working employees and state whether coverage is for:

- i. Single employee
- ii. Family coverage

24. Provide the projected monthly cost of employer-provided health, life and AD & D benefits as of January 1, 2017, for working employees and state whether the coverage is for:

- i. Single employee
- ii. Family coverage

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25. For calendar year 2016–2017 and to date, provide the following health care utilization information for bargaining unit employees:

- A. Number of primary beneficiaries
- B. Number of carved participants, including dependents
- C. Number of hospital in-patient visits
- D. Number of hospital in-patient days
- E. Total hospital in-patient claim dollars paid
- F. Number of prescription drugs
- G. Total prescription drug claim dollars paid
- H. Number of physical visits
  - i. in hospital
  - ii. out of hospital
- I. Total physician claims dollars paid
  - i. in hospital
  - ii. out of hospital
- J. Number of out-patient visits
- K. Total out-patient claims dollars paid
- L. Number of emergency room visits
- M. Total emergency room claims dollars paid
- N. Number of diagnostic lab tests performed
- O. Total lab test claims dollars paid
- P. Number of diagnostic x-rays performed
- Q. Total x-ray claims cost paid

26. Provide a list of all warranties held by the Employer, identifying each item of equipment held by warranty and the expiration date of the warranty.

Identify all new mines and facilities opened since January 1, 2017. For each such operation, specify:

- A. Type of operation
- B. Number of employees performing work of a classified nature
- C. Number of exempt employees

27. Provide a listing of all companies that have operated mines or other facilities under a lease or license agreement (including a mining agreement) since January 1, 2017 where the production or work was performed in part or entirely for the Employer or an affiliate. The listing should include:

- A. Name of operating company
- B. Name and location of the operation
- C. Annual tonnage produced

D. Average number of employees

E. Union affiliation of employees, if any

F. Type of arrangement (e.g., active, temporarily shut down, sealed and etc.)

28. For calendar year 2016–2017 and to date, provide a quarterly listing of the number of subcontracting jobs performed for the Employer where the total value of the subcontracted work exceeded \$5,000.

- A. Number of such contracts
- B. Total cost of such contracts
- C. Type of work performed
  - i. Transportation
  - ii. Repair and maintenance
  - iii. Construction
  - iv. Reclamation, including revegetation, fine grading and seeding
- D. Reason for such subcontracting
- E. Number of hours worked on each such subcontract

29. For all the subcontracted reclamation work listed above, specify:

- A. Nature of reclamation work
- B. Duration of contract
- C. Number of employees
- D. Job classification of employees

30. Provide the number of bargaining unit employees performing reclamation work on an annual basis for calendar year 2016–2017, and to date.

31. On an annual basis for calendar year 2016–2017, and to date, provide a record of coal sales by type of transaction:

- A. Long term contracts (greater than five years)
- B. Short term contract (less than five years)
- C. Spot market

32. On an annual basis for calendar year 2016–2017, and to date, provide a record of coal sales in the following distribution:

- A. Domestic sales
  - 1. Electric utilities
  - 2. Steel producers
  - 3. Other industry
- B. Canadian export
  - 1. Electric utilities
  - 2. Steel producers

3. Other industry
- C. Overseas export
  1. Electric utilities
  2. Steel producers
  3. Other industry

33. State the total amount of Coal which was purchased, either directly or indirectly, by the Employer in calendar year 2016–2017, and to date, the source of the purchased coal and the means by which the coal was purchased.

34. Provide the most recent budget or forecast on an annual basis for the years 2016–2017, and to date, including projections of the following categories of information:

- A. Tons
- B. Number of employees
- C. Revenue
- D. Net income
- E. Labor cost per ton
- F. Mines schedule to be opened, or operations expanded
- G. Mines projected to be conveyed, assigned or transferred

35. For calendar year 2016–2017 and to date, please provide a quarterly list of contributions to any pension plan, savings plan and/or 401(k) account in effect for bargaining unit employees.

It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003). Paragraphs 1–4, 7, 8, 25, 30, and 35 specifically refer to “bargaining unit employees” and thus clearly request presumptively relevant information. The Respondent has not asserted any basis for rebutting the presumptive relevance of that information. Rather, the Respondent raises as an affirmative defense its contention, rejected above, that the Union was improperly certified. We find that the Respondent unlawfully refused to furnish the information sought by the Union in paragraphs 1–4, 7, 8, 25, 30, and 35.

Additionally, it is well established that although a union's information request might not be specifically limited to bargaining unit employees and therefore could be construed as requesting information pertaining to nonunit employees as well as unit employees, this does not justify an employer's blanket refusal to comply with the un-

ion's request. See *Superior Protection Inc.*, 341 NLRB 267, 269 (2004) (“an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent it encompasses necessary and relevant information”), *enfd.* 401 F.3d 282 (5th Cir. 2005), *cert. denied* 546 U.S. 874 (2005); *Streicher Mobile Fueling*, 340 NLRB 994, 995 (2003) (failure to limit request to bargaining unit information did not excuse noncompliance with request as to unit employees), *affd. mem.* 138 Fed. Appx. 128 (11th Cir. 2005). In such cases, the Board will construe a request that seeks information that is otherwise presumptively relevant as pertaining to unit employees, even though the information requested is not consistently described in these specific terms. See, e.g., *Metro Health Foundation*, *supra* at 803 fn. 2 (partial denial of summary judgment on information request did not excuse failure to provide other, clearly relevant, information, which the Board construed to pertain to unit employees); *Freyco Trucking, Inc.*, 338 NLRB 774, 775 fn. 1 (2003) (request for payroll records and benefit fund payments construed to pertain to unit employees). Accordingly, we find that the fact that paragraphs 5, 6, and 9–24 do not specifically refer to “bargaining unit employees” does not excuse the Respondent's failure to furnish the information requested in those paragraphs to the extent that they could be construed to pertain to unit employees. To the extent that those paragraphs pertain to nonunit employees, we deny summary judgment and remand them to the Regional Director for further appropriate action.

Paragraphs 26–29 and 31–34, however, request financial information, information concerning only nonunit employees, or other information that is not presumptively relevant. The pleadings fail to indicate why the Union needs that information or to otherwise indicate the relevance of that information. Therefore, we deny summary judgment with respect to paragraphs 26–29 and 31–34, and remand those issues to the Regional Director for further appropriate action.

For the reasons stated above, we grant the Motion for Partial Summary Judgment and order the Respondent to bargain with the Union and to furnish the Union with the information that it requested on February 28, 2018, with the exception of the information requested in paragraphs 5, 6, and 9–24 to the extent that those paragraphs pertain to nonunit employees and the information requested in paragraphs 26–29 and 31–34.

On the entire record, the Board makes the following



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## FINDINGS OF FACT

## I. JURISDICTION

At all material times, the Respondent has been a limited liability corporation with an office and place of business in Wharton, West Virginia (the Respondent's facility), and has been engaged in the mining of coal.

In conducting its operations during the 12-month period ending June 1, 2018, the Respondent sold and shipped from the Respondent's facility goods valued in excess of \$50,000 directly to points located outside the State of West Virginia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on August 3, 2017, the Union was certified on February 16, 2018,<sup>2</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including mobile equipment operators, mechanics, welders, and oilers employed by the Employer at the Glancy Surface Mine located in Wharton, West Virginia; but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

About February 28, 2018, the Union, by letter, fax, and email, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about March 1, 2018, the Respondent has failed and refused to do so.

About February 28, 2018, the Union requested that the Respondent furnish it with the information set forth above, which, except as described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since March 1, 2018, the Respondent has failed

and refused to furnish the Union with the relevant information.<sup>3</sup>

We find that the Respondent's conduct described above constitutes an unlawful failure and refusal to recognize and bargain with the Union and an unlawful failure and refusal to furnish requested information to the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since March 1, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union with requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union with the information requested on February 28, 2018, with the exception of the information requested in paragraphs 5, 6, and 9–24 to the extent that those paragraphs pertain to nonunit information and the information requested in paragraphs 26–29 and 31–34.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir.), *cert. denied* 379 U.S. 817 (1964).

<sup>2</sup> By unpublished order dated June 21, 2018, the Board denied the Respondent's request for review.

<sup>3</sup> The complaint alleges that about February 19, 2018, the Union, by letter and email, initially requested that the Respondent recognize and bargain with it and furnish it with the information set forth above. The Respondent's answer denies those allegations and contends that it did not receive the Union's February 19, 2018 requests. However, the Respondent's answer admits that it received the Union's identical February 28, 2018 requests and that it has failed and refused to bargain with or furnish the requested information to the Union since March 1, 2018. As a determination regarding the date on which the Respondent first received the Union's requests to bargain and to furnish information does not affect the remedy, we find it appropriate to rely on the Respondent's uncontested admission that it received the Union's bargaining and information requests on February 28, 2018, and has refused to bargain with or furnish the requested information to the Union since March 1, 2018. Accordingly, the Respondent's denials regarding the earlier requests do not raise issues of fact warranting a hearing.

## ORDER

The National Labor Relations Board orders that the Respondent, Rockwell Mining LLC, Wharton, West Virginia, its officers, agents, successor and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Mineworkers of America, AFL-CIO, Region 2, District 12 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, including mobile equipment operators, mechanics, welders, and oilers employed by the Employer at the Glancy Surface Mine located in Wharton, West Virginia; but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on February 28, 2018, with the exception of the information requested in paragraphs 5, 6, and 9-24 to the extent that those paragraphs pertain to nonunit information and the information requested in paragraphs 26-29 and 31-34.

(c) Within 14 days after service by the Region, post at its Wharton, West Virginia facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 09, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places,

including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 09 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that this case is remanded to the Regional Director for Region 09 for further appropriate action.

Dated, Washington, D.C. December 11, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



ROCKWELL MINING LLC

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Mineworkers of America, AFL-CIO, Region 2, District 12 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, including mobile equipment operators, mechanics, welders, and oilers employed by us at the Glancy Surface Mine located in Wharton, West Virginia; but excluding all other employees, of-

fice clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on February 28, 2018, with the exception of the information requested in paragraphs 5, 6, and 9-24 to the extent that those paragraphs pertain to nonunit information and the information requested in paragraphs 26-29 and 31-34.

ROCKWELL MINING LLC

The Board's decision can be found at <https://www.nlr.gov/case/09-CA-216001> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 15, 2019, I caused to be electronically filed the foregoing Underlying Decision From Which the Petition Arises with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. Service was accomplished on all parties using the CM/ECF system.

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